

Remarks

This Response is considered fully responsive to the Office Action mailed April 18, 2007. Claims 1-23 were pending in the application. Claims 1, 5-8, and 13-23 stand rejected. Claims 2-4 and 9-12 were objected to. In this Response, claim 1 is amended, and no claims are added or canceled. Reexamination and reconsideration are requested.

Telephonic Examiner Interview

On July 10, 2007, registered patent attorney Allison Olenginski of the Undersigned's law firm spoke with Examiner Qureshi by telephone. Ms. Olenginski asked Examiner Qureshi whether the Double Patenting Rejections in the Office Action were based on *In re Schneller*, 397 F.2d 350, 158 USPQ 210 (CCPA 1968). Examiner Qureshi confirmed. Ms. Olenginski also asked Examiner Qureshi whether approval of the Technology Center Director was obtained before making the non-statutory double patenting rejections under *In re Schneller*, as required in MPEP §804, because no such indication was provided in the Office action or in the electronic filewrapper. In the telephone call, Examiner Qureshi could not provide evidence of such approval. No agreement was reached, as Examiner Qureshi instructed Ms. Olenginski to provide arguments in a response.

Double Patenting Rejections

The Office has rejected claims 1 and 5-8 and 13-23 based on nonstatutory double patenting rejections, and further appears to rely specifically upon *In re Schneller* (as indicated by Examiner Qureshi in the telephone call and in the text of the Office action). The Applicant traverses the rejections.

As an initial matter, nonstatutory double patenting rejections under *In re Schneller* are "rare" and "is limited to the particular facts of the case." MPEP §804 citing *In re Schneller*, 397 F.2d 350, 158 USPQ 210 (CCPA 1968). "The fundamental reason for the rule is to prevent unjustified timewise extension of the right to exclude granted by a patent no matter how the extension is brought about." *In re Schneller*, 397F.2d at 354, 158 USPQ at 214 (emphasis in original). This is the "controlling factor" of *In re Schneller*. See e.g., *In re Schneller*, 397 F.2d at 355, 158 USPQ at 215. Nonstatutory double patenting rejections under *In re Schneller* require approval of the Technology Center Director. MPEP §804.

In the present application, the *In re Schneller* rejections are based on the U.S. Patent No. 6,608,819 to Mitchem et al. (“Mitchem”) and U.S. Patent No. 6,233,236 to Nelson et al. (“Nelson”), the parent and grandparent respectively of the present application. If issued, a patent resulting from the present application will expire on the same date as both Mitchem and Nelson. As such, there is no unjustified timewise extension of patent protection if the present claims are allowed. Therefore, as to claims 1, 5-8, and 13-23 of the present application, the nonstatutory double patenting rejections under *In re Schneller* are inappropriate, as the controlling factor is absent. Furthermore, there is no indication of the required Technology Center Director approval of the nonstatutory double patenting rejection under *In re Schneller*. According, withdrawal of the rejections under *In re Schneller* is requested.

Nevertheless, as the text of the rejection of claims 1, 5-8, and 12-23 may also be interpreted to suggest standard nonstatutory double patenting rejections, the Applicant submits the following.

Claims 1 and 5-8 stand rejected on the ground of nonstatutory double patenting over claims 22 and 10-12 of Mitchem. Claim 1 has been amended to correct minor informalities, without narrowing the claim. Also, the Applicant believes the reference to claim 15 in this section of the Office action to be a typographical error and interprets the rejection to apply to claim 5, not claim 15 (which is addressed in a subsequent section of the Office action).

Claims 1 and 5 now recite, in part, comparing content [of a data frame] with a template (e.g., template 34 of FIG. 5). In contrast, claim 22 of Mitchem recites comparing revised data with predetermined data located at a specific location on each of the received frames, wherein the revised data is generated from a bit-wise ANDing of the predetermined data with a data mask. While the Applicant does not acquiesce to the Office’s strict equating of the “predetermined data” to a “template” (see e.g., template 34 of FIG. 5), there is simply no disclosure or suggestion of a comparing content with a template in this “comparing” clause, at least because the revised data does not represent content (but is instead generated data from the bit-wise ANDing operation). Furthermore, claim 22 of Mitchem recites comparing adjusted scores, which are adjusted from an initial score with one or more alternative score components. In this second “comparing” clause, there is no disclosure or suggestion of content, a template, or a comparison between them. As such, claim 22 of Mitchem does not disclose or suggest comparison of content with a template. Therefore, the Applicant asserts that “comparing the

content with a template” is distinct from the limitation “comparing the adjusted scores” or “comparing the revised data with the predetermined data.”

Furthermore, claims 10-12 are silent as to a “template”, disclosing only that content of a frame is evaluated. As such, claims 10-12 do not disclose or suggest comparison of content with a template. For the foregoing reasons, withdrawal of the double patenting rejection of claims 1 and 5 is respectfully requested.

With regard to claims 6-8, the Office has equated the “initial score” of claim 10 of Mitchem with the “QOS score” of claim 6 of the present application. However, the Applicant points out that the “initial score” of Mitchem is adjusted and “thereafter” the frame having the highest score is selected. As such, the “initial score” is not used to select the frame – only a score after adjustment is used to select the frame. In contrast, the QOS score of the present application is used to select the frame. As such, the Office’s equating of “initial score” and “QOS score” is inconsistent with the claim language, because the “initial score” in Mitchem is not used to select the frame. For the foregoing reasons, withdrawal of the double patenting rejection of claims 6-8 is respectfully requested.

Claims 13-23 stand rejected on the ground of nonstatutory double patenting over claims 2-11 of Nelson, although the rejection references claim 1 of Nelson as supporting the rejection. Accordingly, the Applicant responds on the basis that claim 1 of Nelson is used to reject claim 13 of the present application.

Claims 13 and 19 recite, in part, “means for associating a quality of service value with the frame based upon the metadata matching the template held in the second register.” The Office admits that claim 1 (and by association, claim 7) of Nelson does not disclose this recited feature. However, the Office submits that it would be obvious “to associate at least one parameter...with the frame...based upon the entire data that matches the template since the invention is concerned with monitoring the user specified fame type sent by the source.” Page 5, Office Action. The Applicant respectfully asserts that nothing in claim 1 of Nelson, or anywhere in Nelson, discloses or suggests using a template in association with a quality of service. The terms “quality,” “service”, and “priority” are completely absent from Nelson, particularly in claims 1 and 7. Furthermore, the Office has provided no support for its obviousness argument, except to suggest that a QOS parameter may be used. However, this proposal by the Office is not supported by the cited claim 1 of Nelson and is not supported by any disclosure within Nelson. For the foregoing

reasons, withdrawal of the double patenting rejection of claims 13 and 19 is respectfully requested.

Claims 14-18 depend from claim 13 and claims 20-23 depend from claim 19, both of which are believed to be allowable. As such, claims 14-18 and claims 20-23 are believed allowable for at least the same reasons as claim 13 and claim 19, Allowance of claims 13-23 is respectfully requested.

Allowable Subject Matter

Claims 2-4 and 9-12 stand objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims. As the Applicant believes that the nonstatutory double patenting rejections of the base claims are overcome by the arguments made herein, Applicants respectfully submit that claims 2-4 and 9-12 are in condition for allowance in their original form.

Conclusion

Claims 1-23 are currently pending in the application. Applicant has fully responded to each and every objection and rejection in the Office action dated April 18, 2007 and believes that claims 1-23 are in a condition for allowance. Applicant therefore requests that a timely Notice of Allowance be issued in this case.

The Applicant believes no fees or petitions are due with this filing. However, should any such fees or petitions be required, please consider this a request therefor and authorization to charge Deposit Account No. 50-3199 as necessary.

If the Examiner should require any additional information or amendment, please contact the undersigned attorney. If the Examiner believes any issues could be resolved via a telephone interview, the Examiner is invited to contact the undersigned at the telephone number listed below.

Respectfully submitted,

Date: 18 July 2007

/Richard J. Holzer, Jr./

Richard J. Holzer, Jr. Reg. No. 42,688
Attorney for Applicant
USPTO Customer No. 48929
HENSLY KIM & HOLZER, LLC
1660 Lincoln Street, Suite 3000
Denver, Colorado 80264
Tel: 720-377-0770
Fax: 720-377-0779